

**Velazquez-Guadalupe v Ideal Bldrs. & Constr. Servs.,
Inc.**

2019 NY Slip Op 34960(U)

December 23, 2019

Supreme Court, Queens County

Docket Number: Index No. 709223 2017

Judge: Carmen R. Velasquez

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cross claims against defendant CDW, and on this cross motion by defendants John Argyros and Dana M. Argyros for leave to serve an amended answer with an amended cross claim and that said amended answer with amended cross claim be deemed served with a copy of this cross motion and to convert the cross claims against defendant CDW into a third-party complaint against defendant CDW in the event that defendant CDW's motion dismissing the complaint of plaintiff Velazquez-Guadalupe is granted.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits	EF172-188, 277-293
Notice of Cross Motion - Affidavits - Exhibits	EF364-372
Answering Affidavits - Exhibits	EF190-191, 206-211, 230- 232, 313, 351- 363, 377, 399- 400, 414
Reply Affidavits	EF247-249, 256-259, 339- 340, 401-402, 404-408, 422- 423, 444

Upon the foregoing papers it is ordered that the motions and cross motion are consolidated and determined as follows:

This is an action by plaintiffs Salvador Velazquez-Guadalupe and Baljinder Singh¹ to recover damages for personal injuries allegedly sustained by them on June 20, 2017. Plaintiffs allege that they sustained injuries while doing construction work at adjoining premises located at 31-25 and 31-27 28th Road in Astoria, New York, when the roof and a portion of the building on which they were working collapsed because the roof was

¹Plaintiff Singh originally commenced a separate action under Index Number 7127/2017 which was consolidated with this action brought by plaintiff Velazquez-Guadalupe pursuant to an order of the Hon. Pam Jackman Brown dated March 16, 2018, and entered April 23, 2018.

overloaded with excessive construction materials, burying them under the materials and debris. Defendant Cindy Koumantaros is the owner of the premises located at 31-25 28th Road, Astoria, New York. Defendants John Argyros and Dana M. Argyros are the owners of the adjoining premises located at 31-27 28th Road, Astoria, New York.² In his pleadings and initial workers' compensation filings, plaintiff Velazquez-Guadalupe asserted that at the time of the subject accident, he was employed by third-party defendant J. United Construction Corp., which was the employer of plaintiff Singh. During his examination before trial, however, plaintiff testified that at the time of the subject accident, he was employed by defendant CDW.

After a hearing in plaintiff Velazquez-Guadalupe's workers' compensation matter, a Workers' Compensation Law Judge determined in a decision filed October 10, 2018, that plaintiff Velazquez-Guadalupe had a work-related injury and that defendant CDW was plaintiff Velazquez-Guadalupe's employer, and awarded benefits to plaintiff. That decision was not appealed, and the time to do so, has expired.

Defendants JSK and CDW now separately move for summary judgment. Defendant JSK also seeks an award of sanctions. Defendants John Argyros and Dana M. Argyros cross-move for leave to serve an amended answer adding a cross claim against defendant CDW for breach of an agreement to procure insurance for their benefit.

The cross motion of defendants John Argyros and Dana M. Argyros for leave to amend their answer to assert a cross claim against defendant CDW to recover damages for breach of an agreement to procure insurance is granted. The proposed amendment to the answer is neither palpably insufficient, nor patently devoid of merit, and defendant CDW has made no showing of prejudice or surprise. (*See CPLR 3025 [b]*; *see also Simon v Granite Bldg. 2, LLC*, 114 AD3d 749 [2d Dept 2014]; *Aurora Loan Servs., LLC v Thomas*, 70 AD3d 986 [2d Dept 2010].)

The proposed amended verified answer which was included with the cross motion papers of defendants John Argyros and Dana M. Argyros in this electronically filed action is deemed served.

²In an order of the court dated July 31, 2019, and entered August 9, 2019, defendant Candice Ingaglio, who was alleged to be one of the owners of 31-27 28th, was granted summary judgment and plaintiffs' complaint and all cross claims against her were dismissed.

Defendant CDW seeks summary judgment in its favor dismissing plaintiff Velazquez-Guadalupe complaint, the cross claims of defendant/third-party plaintiff Ideal Builders and Construction Services, Inc. (Ideal), defendant Koumantaros, third-party defendants Hephaistos Building Supplies, Inc. and Hephaistos Developing, LLC (collectively Hephaistos), and defendants John Argyros and Dana M. Argyros for contribution and common-law indemnification, and the cross claim of defendants John Argyros and Dana M. Argyros for contractual indemnification against defendant CDW.

In general, Workers' Compensation benefits are the exclusive remedy of an employee against an employer for any damages sustained from injury or death arising out of and in the course of employment. (*See* Workers Compensation Law § 11; *see also Cronin v Perry*, 244 AD2d 448 [2d Dept 1997]). “[C]ontroversies regarding the applicability of the Workers' Compensation Law rest within the primary jurisdiction of the Workers' Compensation Board, including issues as to the existence of an employer-employee relationship.” (*Santiago v Dedvukaj*, 167 AD2d 529, 529 [2d Dept 1990] [citations omitted].) The determination of the Workers' Compensation Board is final and binding, and a plaintiff may not maintain an action against a defendant from whom he or she has accepted Workers' Compensation benefits by arguing that he or she was actually employed by a different entity. (*See Maropakos v Stillwell Materials Corp.*, 38 AD3d 623 [2d Dept 2007].)

“The doctrine of collateral estoppel . . . precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of actions are the same.” (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984].) In determining if privity exists between the parties, “courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion, and whether preclusion, with its severe consequences, would be fair under the particular circumstances.” (*Baten v Northfork Bancorporation, Inc.*, 85 AD3d 697, 698 [2d Dept 2011], citing *Buechel v Bain*, 97 NY2d 295, 304-305 [2001].)

In this case, plaintiff Velazquez-Guadalupe is collaterally estopped from challenging the Workers' Compensation Board's findings that he was employed by defendant CDW because he had a full and fair opportunity to contest those findings through the Board's appeals process and chose not to do so. Thus, defendant CDW established its entitlement to summary judgment dismissing plaintiff Velazquez-Guadalupe's claims asserted against it as barred by the exclusivity provisions of the Workers' Compensation Law.

Plaintiff Velazquez-Guadalupe, in opposition, failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]), and his claim that this branch of the

motion is premature is without merit. (*See Lucey v Golton Marine Co.*, 267 AD2d 360 [2d Dept 1999].)

Accordingly, the branch of defendant CDW's motion seeking summary judgment in its favor dismissing plaintiff Velazquez-Guadalupe's complaint as against it is granted.

Defendant CDW failed to show that the collateral estoppel doctrine applies to defendant/third-party plaintiff Ideal, defendant Koumantaros, third-party defendants Hephaistos, and defendants John Argyros and Dana M. Argyros as said parties were not parties to, nor did they appear in the Workers' Compensation proceeding, and there is no evidence that they are in privity with defendant CDW. Thus, inasmuch as defendant/third-party plaintiff Ideal, defendant Koumantaros, third-party defendants Hephaistos, and defendants John Argyros and Dana M. Argyros have not been shown to be in privity with defendant CDW, and they were not afforded an opportunity to cross-examine witnesses or present evidence at the hearing in the Workers' Compensation proceeding, the determination therein, that defendant CDW was plaintiff Velazquez-Guadalupe's employer on the subject date, cannot have preclusive effect on them in the instant action. (*See Baten v Northfork Bancorporation, Inc.*, *supra*.)

Accordingly, the branches of defendant CDW's motion seeking summary judgment in its favor dismissing the cross claims of defendant/third-party plaintiff Ideal, defendant Koumantaros, third-party defendants Hephaistos, and defendants John Argyros and Dana M. Argyros for contribution and common-law indemnification against defendant CDW based upon the determination of the Workers' Compensation Board that defendant CDW was plaintiff Velazquez-Guadalupe's employer are denied.

The branch of defendant CDW's motion seeking summary judgment in its favor dismissing the cross claim of defendants John Argyros and Dana M. Argyros against it for contractual indemnification is granted.

Defendant CDW, in support of this branch of the motion, submitted a copy of defendant CDW's estimate for the work to be performed by it, which does not contain any indemnification language. Defendants John Argyros and Dana M. Argyros, in opposition to this branch of the motion, failed to present competent evidence raising a triable issue of fact.

Defendant JSK seeks summary judgment dismissing plaintiff Velazquez-Guadalupe's complaint and all related cross claims against it on the grounds that it was not at the subject construction site on the date of the accident and was in no way responsible for the subject accident.

“A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment.” (*Malester v Rampil*, 118 AD3d 855, 856 [2d Dept 2014]; *see Video Voice, Inc. v Local T.V., Inc.*, 114 AD3d 935 [2d Dept 2014]; *see also Bank of Am., N.A. v Hillside Cycles, Inc.*, 89 AD3d 653 [2d Dept 2011].) A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party’s position may exist but cannot then be stated. (*See CPLR 3212 [f]*; *see also Brea v Salvatore*, 130 AD3d 956 [2d Dept 2015]; *Nicholson v Bader*, 83 AD3d 802 [2d Dept 2011].)

In this case, only limited discovery has taken place, and only plaintiff Velazquez-Guadalupe’s examination before trial has been conducted. Moreover, the note of issue was vacated in this action by the Hon. David Elliot, in an order, dated October 8, 2019, and entered October 17, 2019, “[d]ue to the fact that significant discovery is outstanding.” Under such circumstances, and the showing by the parties opposing the motion that facts may exist to defeat defendant JSK’s motion but cannot be stated, the motion of defendant JSK for summary judgment is premature. (*See Martinez v 305 W. 52 Condominium*, 128 AD3d 912 [2d Dept 2015]; *see also Mottley v Walker*, 126 AD3d 955 [2d Dept 2015]; *Malester v Rampil, supra.*)

Accordingly, the branch of the motion of defendant JSK seeking summary judgment dismissing plaintiff Velazquez-Guadalupe’s complaint and all related cross claims against it is denied without prejudice to renew upon completion of discovery and in accordance with the CPLR and Court Rules.

The branch of the motion of defendant JSK seeking sanctions is also denied.

Dated: December 23, 2019


CARMEN R. VELASQUEZ, J.S.C.

